

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION

4 UNITED STATES OF AMERICA

5 Government.

6 v.

Case No. 10-20346

7 ANTHONY POPE,  
8 DEMONDRE LEVELLE MARTIN  
9 MICHAEL DEON DAVIS,  
DEAUNTE LORENZO PATRICK,  
ELRIC0 LAQUAN WELCH,

10 Defendants.  
11 \_\_\_\_\_/

12  
13 MOTION HEARING

14  
15 BEFORE THE HONORABLE GERALD E. ROSEN  
United States District Judge  
16 733 US Courthouse & Federal Building  
231 Lafayette Boulevard West  
17 Detroit, Michigan  
Wednesday, November 17, 2010  
18

19 APPEARANCES:

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21 JEANINE JONES  
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23 On behalf of the Government.

24 To Obtain a Certified Transcript:  
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25 313.961.7552  
www.transcriptorders.com

Usa v Pope, et al 10-20346

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3 APPEARANCES (continuing):

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On behalf of Defendants Pope and standing  
in for Attorney Tholen representing  
Defendant Welch.

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On behalf of Defendant Patrick.

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2110 Penobscot Building  
Detroit, MI 48226  
On behalf of Defendant Martin.

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MARIA MANNARINO  
431 Gratiot  
Detroit, MI 48226  
On behalf of Defendant Davis.

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E X H I B I T S

IDENTIFICATION

MARKED

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None Marked

1 Detroit, Michigan

2 Wednesday, November 17, 2010

3 12:55 p.m.

4 THE LAW CLERK: Calling case number 10-20346,  
5 United States of America versus Annie Eugene Pope,  
6 Demondre Martin, Michael Deon Davis, Deaunte Lorenzo  
7 Patrick and Elrico Laquan Welch.

8 THE COURT: Good afternoon.

9 Appearances, starting with the government.

10 MR. O'BRIEN: John O'Brien on behalf of the United  
11 States.

12 MS. JONES: Jeanine Jones on behalf of the United  
13 States.

14 THE COURT: From the defense?

15 MR. MULLKOFF: Douglas Mullkoff. I represent  
16 Mr. Pope; standing in for Mr. Welch for David Tholen.

17 MR. SCHULMAN: Sanford Schulman on behalf of  
18 Deaunte Patrick.

19 MR. MAGIDSON: Mark Magdison on behalf of Demondre  
20 Martin, defendant two, seated to my left.

21 MS. MANNERINO: Afternoon.

22 Maria Mannarino on behalf of Michael Davis, defendant  
23 number three, who is seated to my left.

24 THE COURT: All right. So the record should  
25 reflect several things.

Motion for 404(b) and 609 Evidence

1 First, Mr. Tholen was not able to be with us, but he  
2 did participate by phone in the conference that I had with  
3 counsel in chambers and indicated that Mr. Mullkoff was --  
4 had his proxy to participate in the motion practice here  
5 this afternoon.

6 Beyond that, I want to take -- we have a number of  
7 different motions scheduled for today. And I want to take  
8 what I would consider to be the more readily resolvable  
9 ones first, those being the discovery motions, because I  
10 think we can make some progress on those pretty quickly.

11 Let me talk, first, about the renewed request for  
12 404(b) and 609 information.

13 There was also -- I should add, there was a recently  
14 filed motion which the government's not responded by  
15 Defendant Davis, also for 404.

16 MS. JONES: We did respond.

17 THE COURT: You did respond?

18 MS. JONES: I responded this morning.

19 THE COURT: Oh. Better late than never.

20 MS. JONES: Technically, I had 14 days.

21 THE COURT: At any rate, even without the benefit  
22 of the government's response, I think I can probably  
23 deal with these.

24 The government argues that some of the 404(b)  
25 information, particularly prior convictions relating to

## Motion for 404(b) and 609 Evidence

1 drug trafficking or drug activity of these defendants,  
2 should be admissible on the issues of intent, motive,  
3 plan, preparation.

4 As I shared with counsel in chambers, it has always  
5 been the practice of this Court when it comes to 404(b)  
6 issues of this nature, prior specific instances of  
7 conduct, whether convicted or not, conduct that is offered  
8 on the issue of intent, recognizing the government does  
9 have the burden of proving intent as an element, but also  
10 recognizing that there's a substantial overlap between the  
11 use of prior acts to prove intent and the propensity  
12 inference under -- which is under Rule 404(b) prohibited.

13 And my general policy is that as to specific  
14 instances of conduct offered to prove intent, if the only  
15 inference from the prior acts -- if the only inference is  
16 that if he did it before, he probably intended to do it  
17 again, that falls within the proscribed propensity  
18 inference that is not permissible under the rules.

19 Having said that, if the defendants at trial put  
20 forth a defense that raises the issue of their intent to  
21 participate in this conspiracy, if the defendants  
22 affirmatively come forward, and by that I mean either in  
23 opening statement, closing argument or by evidence; if  
24 they come forward with defenses that raises the question  
25 of their intent to participate in this conspiracy, at that

Motion for 404(b) and 609 Evidence

1 point, the 404(b) information becomes relevant on the  
2 issue -- at least on the issue of intent.

3 So I guess for purposes of the 404(b) question, the  
4 defendants hold the key to whether or not that door gets  
5 opened or not.

6 Obviously, that means I can't rule definitively on it  
7 here today. So what I'm going to do is simply deny it  
8 without prejudice as to the use of this information.

9 And I want to make sure, though, that the government  
10 has -- discloses all possible 404(b) evidence.

11 And I know that the government is aware of its  
12 obligation under Rule 404(b) to provide notice of any  
13 404(b) activity or action prior to trial.

14 But I'm going to deny the motions without prejudice  
15 to the defense to raise it again.

16 And/or for that matter, if the government wishes to  
17 request the Court at trial to introduce 404(b) evidence if  
18 it believes the defendants have somehow raised the issue  
19 by either opening statement or perhaps in cross  
20 examination or through proofs, I'll leave it to the  
21 parties to raise that issue once there's an evidentiary  
22 context for which the Court can decide it.

23 Similarly, 609 evidence. Defendant Patrick, I  
24 believe, has 609 questions.

25 I almost never decide 609 issues until I've seen what



Motion for 404(b) and 609 Evidence

1 the evidence looks like so that I can perform the  
2 balancing act or the balancing test under Rule 609(a)(1);  
3 that's particularly true where there are issues of the  
4 defendant himself potentially testifying.

5 The question of the identity of the government  
6 informant. I don't think that Defendant Martin or the  
7 other defendants have joined in or have come forward yet  
8 with -- Mr. O'Brien?

9 MR. O'BRIEN: All of that information was mailed  
10 out a little over week ago, judge.

11 THE COURT: Well, the government's -- this is a  
12 C.I. --

13 MR. O'BRIEN: Yes.

14 THE COURT: -- 58?

15 MR. O'BRIEN: Yes.

16 THE COURT: You've disclosed his identity?

17 MR. O'BRIEN: Yes.

18 THE COURT: Well, that makes that much more easy  
19 to rule on. Yes?

20 MR. MULLKOFF: Judge, this would be our motion --  
21 Mr. Pope's motion for discovery of the informant's  
22 identity which has been joined by a few of the  
23 co-defendants.

24 THE COURT: I thought Defendant Martin had the  
25 motion.

Motion For Discovery

1 MR. MAGIDSON: I can defer to Mr. Mullkoff.

2 THE COURT: Mr. Mullkoff, since you're standing  
3 there.

4 MR. MULLKOFF: What I'm going to say is --

5 THE COURT: You've already got what you need,  
6 though.

7 MR. MULLKOFF: We have -- I'm going to confirm  
8 that we got information about the informant; his name,  
9 his compensation and related information about his  
10 criminal history, so I feel that the substance of what  
11 we're looking for has been complied with.

12 I also spoke with Mr. O'Brien and have been assured  
13 that everything short of grand jury has been given to us.

14 THE COURT: Does that mean, Mr. O'Brien, that you  
15 intend to have CI-85 testify?

16 MR. O'BRIEN: Yes, sir.

17 THE COURT: Well, that was going to be my first  
18 question.

19 MR. O'BRIEN: In addition to that, because I'd  
20 just like to follow up on a piece of Mr. Magdison's  
21 motion or request he and I had been discussing for  
22 sometime has to do with the issue of telephone records;  
23 telephone calls between the ATF agents, his client,  
24 CI-85, Mr. Pope.

25 We ran into a little bit of an issue, judge, because

Motion For Discovery

1 of the date at which -- against which I was subpoenaing  
2 records wasn't the trial date with the request of the  
3 phone companies, please produce those in advance.

4 Perhaps the attorneys could work it out so they don't  
5 have to sacrifice an employee to come testify during the  
6 trial.

7 We are in receipt -- at this point I know all the  
8 records aren't in yet of over six or 700 pages of records  
9 because the agents used their phone for this case, for  
10 other cases. I suspect there's also defendant's wives and  
11 whoever on there.

12 We're in the process of sorting all of those phone  
13 numbers that are pertinent to this case in a summary form  
14 so that the defense has the phone numbers of the  
15 incoming-outgoing calls that are specific to the numbers  
16 that relate to this case on the agent's calls back and  
17 forth to their clients. That has not been produced.

18 But because we're taking the time to do that, I think  
19 the product will be much more useful to both sides and the  
20 Court --

21 THE COURT: That's helpful.

22 How long do you think it will take you to do that?

23 MR. O'BRIEN: A week for all the records we have  
24 now.

25 When I say another week, judge, we're talking about

## Motion For Discovery

1 before Thanksgiving next Wednesday.

2 And then if additional records come in, I do expect a  
3 few more, only because there were dates on two of the  
4 phone number subpoenas or three of the phone number  
5 subpoenas that were seized at the time of the arrest.

6 And the dates were as -- up to the date of arrest  
7 started that day of arrest, we got a bunch of records back  
8 said there were no calls. We would expect there would be  
9 none.

10 The phones were seized that day. Now they're going  
11 backwards in time into March and February as opposed to  
12 forward to November. But that may take a little bit  
13 longer.

14 THE COURT: Mr. Mullkoff, Mr. Magdison, I assume  
15 that answers your motions with respect to confidential  
16 informant and production of recordings, notes, et  
17 cetera.

18 Is that right?

19 MR. MAGIDSON: I believe it addresses the issues  
20 we raised with respect to that.

21 THE COURT: And while you're standing or almost  
22 standing, Mr. Magdison, have I answered your questions  
23 on the *in limine* motion on 404(b) as well?

24 MR. MAGIDSON: Thank you, Judge. We understand  
25 your ruling.

Motion to Disclose Grand Jury Transcripts

1 THE COURT: Defendant Patrick has a motion to  
2 disclose grand jury transcripts and identity of  
3 witnesses and informants. This would generally fall  
4 within the *Jencks* Act.

5 Let me ask you, Mr. O'Brien. As you know, my  
6 practice is to generally encourage the government to turn  
7 over all witness statements, including grand jury  
8 testimony, other than in cases involving witness security  
9 or a real concern of witness tampering of any sort.

10 Is that a concern here?

11 MR. O'BRIEN: It is not.

12 I would indicate to the Court, given our decision to  
13 call CI-85 at trial, then based on phone records, I  
14 indicate an interview with that individual only in an  
15 effort to make sure we have all of the information about  
16 that.

17 THE COURT: And the statements from those  
18 interviews will be turned over?

19 MR. O'BRIEN: Absolutely. That's a report that  
20 doesn't yet exist.

21 But anything that's created from here forward, I'll  
22 turn over immediately; transcripts, grand jury  
23 transcripts, we'll make copies of those.

24 THE COURT: Satisfactory?

25 MR. SCHULMAN: I'm satisfied.

Motion to Disclose Grand Jury Transcripts

1 I want to clarify as to our 404(b) and 609, we were  
2 simply asking at this point for notice. If there's any  
3 notice, he can provide that.

4 THE COURT: I've ordered him to give notice. But  
5 I guess it was Defendant Martin who had the substantive  
6 404(b).

7 MR. MAGIDSON: We're satisfied.

8 THE COURT: Although the guidelines that I've  
9 provided certainly goes for all defendants on 404(b).

10 Which brings us to some of the more substantive  
11 issues in motions to dismiss. I want to take those -- I  
12 want to take three of them together, because they all  
13 really involve the same constellation of legal claims.

14 Defendant Martin's motion to dismiss based on  
15 entrapment.

16 Defendant Welch's motion to dismiss for outrageous  
17 conduct or entrapment, failure to state a claim.

18 And Defendant Patrick's motion to dismiss on the  
19 basis of abandonment.

20 All of these issues would require me to have seen  
21 evidence at trial. Let me take, as an example, the  
22 entrapment question.

23 The entrapment question hinges upon whether  
24 Mr. Martin or Mr. Welch had any prior predisposition to  
25 engage in the conspiratorial conduct alleged in the

Motion to Dismiss/Entrapment, Outrageous Conduct,  
Failure to State a Claim, and Abandonment

1 indictment.

2 Before I could make a determination of that, I would  
3 have to see the evidence. Obviously, to the extent that a  
4 defendant may have had prior drug trafficking activity,  
5 that would be very probative of whether or not that  
6 defendant had any prior predisposition.

7 On the issue of abandonment, I think there are  
8 serious factual questions here. Given, as I understand it  
9 the government's contentions and after reviewing the  
10 special agents' affidavit, I think that the defendants'  
11 conduct in arguably pulling away from following the  
12 undercover agent, Jury, is susceptible of a number of  
13 different -- susceptible to a number of different  
14 interpretations.

15 And for me to find abandonment as a matter of law  
16 without any evidentiary context whatsoever, would not only  
17 be premature, but inappropriate. So I'm going to have to  
18 deny that motion.

19 It seems to me that abandonment is a very precise  
20 term of art in which a defendant has to do more than  
21 simply not follow somebody to an alleged meeting site.

22 The defendant has to take affirmative steps to put  
23 other co-conspirators on notice, either directly or  
24 implicitly that they are no longer part of the conspiracy  
25 and have completely abandoned the objectives of the

Motion to Dismiss/Entrapment, Outrageous Conduct,  
Failure to State a Claim, and Abandonment

1 conspiracy rather than, perhaps, putting them off for  
2 another day. So I'm going to have to see some evidence  
3 before I can even make that.

4 With respect to all three of these motions that I've  
5 just delineated, these would be more in the nature of  
6 trial motions after the government has completed its  
7 proof, if counsel still believes that the government has  
8 failed to establish the elements or if counsel continues  
9 with its -- with their entrapment defense.

10 So I'm going to deny these motions again without  
11 prejudice to raise them again; probably in the context of  
12 a Rule 29.

13 Defendant Martin's motion to dismiss based on  
14 duplicity in the indictment. It's an interesting  
15 argument.

16 There are certainly a number of different crimes that  
17 are alleged within the indictment, but I think the law has  
18 now become pretty well settled under *Braverman versus*  
19 *United States*, as well as a number of other cases, that  
20 the mere fact that there are different crimes alleged as  
21 part of a larger conspiracy does not constitute duplicity.

22 Indeed, in almost every -- if you think about it, in  
23 almost every charge of conspiracy, there are different and  
24 distinct crimes.

25 The typical crime being a conspiracy to distribute



Motion to Dismiss/Entrapment, Outrageous Conduct,  
Failure to State a Claim, and Abandonment

1 narcotics which alleges specific narcotic transactions on  
2 specific days; those allege specific crimes and also  
3 allege a larger conspiracy of which these specific crimes  
4 are part. That's basically what we have here.

5 Even though there are allegations which could be read  
6 to allege specific crimes, such as home invasion or  
7 conspiracy with the intent to commit home invasion, those  
8 are all alleged as part of a larger conspiracy crime; and,  
9 therefore, are not subject to a dismissal based on  
10 duplicity.

11 I want to hear arguments from Mr. Patrick's attorney  
12 on the severance issue and where the prejudice is that  
13 would differentiate this from other conspiracy charges in  
14 which one defendant has a lesser role.

15 Mr. Schulman, do you want to address that?  
16

17 MR. SCHULMAN: I'll be brief because, obviously,  
18 I've articulated those issues in my motions.

19 The summary would be Mr. Patrick's involvement as  
20 alleged by the government is at the end of this long book.

21 Now they're introducing a book. The jury, by that  
22 point, will have heard a tremendous amount of information.

23 I understand the conspiracy portion opens the door to  
24 the entire book, that's the governments answer in  
25 principle.

## Motion To Sever

1 But in reality by the time it gets to the last  
2 chapter, prejudice is so damaging that it outweighs any  
3 kind of argument and persuades juries to think of things  
4 that have tied into days and weeks, even months  
5 previously.

6 And that prejudice is the focus of the motion as  
7 opposed to the idea of the conspirators to allow the door  
8 to be wide open.

9 THE COURT: I'm confident, Mr. Schulman, that you  
10 are a well experienced and highly competent criminal  
11 defense lawyer who's tried cases before this Court.

12 I'm very confident that you will be able to point out  
13 Mr. Patrick's relatively alleged limited role in this and  
14 the chronology and time for which it allegedly did occur  
15 and perhaps even use that to Mr. Patrick's advantage at  
16 trial.

17 As you know, the law is that disparity in the  
18 quantities of evidence relating to differing defendants  
19 and disparities as to length of time of involvement in a  
20 conspiracy, those things are not grounds for severance.

21 There has to be some really, unduly prejudicial  
22 aspect to the nature of the evidence from which there  
23 would be a taint or spillover that a much lesser involved  
24 defendant would suffer before severance -- rather drastic  
25 evidence of severance is appropriate.

## Motion To Sever

1 I guess I would say that based upon what I've seen in  
2 this case, although Mr. Patrick didn't show up until late  
3 in the game and his role was at least as alleged by the  
4 government in the special agent's affidavit, that it  
5 doesn't provide grounds for severing him out from the  
6 trial.

7 This is the old rule of in for a penny in for a  
8 point. Unfortunately, Mr. Patrick, like many other  
9 defendants in a conspiracy, is subject to that role.

10 MR. SCHULMAN: Thank you.

11 THE COURT: All right. I think I have now dealt  
12 with each of the pending motions.

13 We should put on the record before I -- Mr. O'Brien?

14 MR. O'BRIEN: I have one question, judge.

15 THE COURT: Yes?

16 MR. O'BRIEN: You said you were going to package  
17 three of them together and you spoke about abandonment,  
18 entrapment --

19 THE COURT: The three I was packaging together are  
20 Defendant Martin's motion to dismiss on entrapment,  
21 Defendant Welch's motion to dismiss for outrageous  
22 conduct and entrapment, failure to state a claim and  
23 Defendant Pope's motion on abandonment. Those are  
24 three I handled separately, the duplicity motion and  
25 severance motion.

Defendant Davis' In Limine Motion

1           Then I handled the discovery motions on Mr. Martin's  
2   404(b) *in limine* motions.

3           MR. O'BRIEN: Thank you.

4           THE COURT: I've also -- so that the record  
5   reflects, I've also handled the more recently filed  
6   motion by Mr. Davis on 404(b), the *in limine* motion.

7           MR. SCHULMAN: Judge, not to interrupt.

8           Is the Court not considering an evidentiary hearing  
9   on the abandonment or entrapment?

10          THE COURT: I don't think an evidentiary hearing  
11   would be appropriate here that would effectively  
12   require me to make an evidentiary finding that might  
13   well be within the province of the jury.

14          MR. SCHULMAN: Rule 29 requires to use exhaustive  
15   resources of a trial as opposed to pretrial. I  
16   understand.

17          THE COURT: We may have to resolve some resources  
18   anyway.

19          MR. SCHULMAN: Thank you, Judge.

20          THE COURT: I do want to put on the record the  
21   fact that counsel and the Court have agreed that with  
22   respect to the trial date that has been set of  
23   December 14th, I'm going to adjourn that.

24          And the trial date that is set for Mr. Pope  
25   individually, that will go forward.

1           Mr. Mullkoff, I'd ask you to make sure that you and  
2 Mr. Pope have a fulsome discussion of that, the necessity  
3 of beginning to prepare.

4           MR. MULLKOFF: Understood.

5           THE COURT: We do have the suppression motion on  
6 December 13th that's going forward. Okay?

7           While we're talking about that, I've got a few more  
8 minutes. What does the government anticipate in terms of  
9 evidence?

10          MR. O'BRIEN: Two witnesses, Your Honor.

11          THE COURT: Two brief witnesses?

12          MR. O'BRIEN: Yes; be Agent Jury and one of the  
13 other agents who was involved in the stop and seizing  
14 of evidence from the vehicle.

15          THE COURT: I'll be very interested to learn at  
16 that hearing what the basis for the stop was.

17          Okay? Anything else?

18          MR. MULLKOFF: For scheduling purposes, ask if the  
19 government -- if the Court would ask the government  
20 about the anticipated length of the drug trial on the  
21 14th.

22          THE COURT: Number of witnesses?

23          MR. O'BRIEN: Potentially four, potentially five.

24          THE COURT: Four or five; that would include  
25 CI-85?

1 MR. O'BRIEN: He's not part of that trial because  
2 none of the charged deliveries are -- involved him.

3 THE COURT: Good. I won't ask you how many  
4 witnesses you're going put on, Mr. Mullkoff.

5 MR. MULLKOFF: I'm not prepared to answer that  
6 question at this time.

7 THE COURT: Since I wasn't asking. Thank you.

8

9 (This hearing concluded at 2:05 p.m.)

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CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript  
from reported proceedings in the above-entitled  
matter.

s/Carol S. Sapala, FCRR, RMR      December 6, 2010